Supreme Court, U.S.
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No. 11-____

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

REYES VELASQUEZ,
Respondent.

On Petition for a Writ of Certiorari to the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner asks this court to resolve a conflict of authority in whether the good-fath exception should be extended to warrantless searches.

The question presented is:

1. Whether the *Leon* good-faith exception to the exclusionary rule applies when law enforcement officers conduct a warrantless search in objectively reasonable reliance on court of appeals precedent that is subsequently overturned by this Court?

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PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of *certiorari* to review the judgment of the Kentucky Court of Appeals in this case.

OPINION BELOW

The Kentucky Court of Appeals opinion is reported as *Velasquez v. Commonwealth,* 2010 WL 567325 (Ky.App.2010). Petitioner's Appendix ("App.") 1a - 7a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky entered an order denying discretionary review, from which relief is sought, on November 10, 2010. App. 8a. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Officer Brian Jared, Lexington Police, conducted a search incident to arrest of the respondent's vehicle after the respondent had been arrested and placed in the police cruiser. Such search revealed three bags of cocaine and a set of digital scales. (App. 2a).

The respondent was charged with first degree trafficking in a controlled substance, first offense; possession of drug paraphernalia, second or greater offense; operating on a suspended/revoked operator's license and failure to or improper signal. The trial court overruled the respondent's motion to suppress. The trial court relied on *New York v. Belton*, 453 U.S. 454 (1981) and *Commonwealth v Wood*, 14 S.W.3d 557 (Ky.App.1999) in concluding that there was no constitutional violation in searching the respondent's

vehicle incident to arrest. (App. 3a).

While respondent's direct appeal was pending in front of the Kentucky Court of Appeals, this Court issued its opinion in *Arizona v. Gant*, ___ U.S. __, 129 S.Ct. 1710 (2009). (App. 3a).

The Kentucky Court of Appeals reversed the trial court's ruling. The court concluded that pursuant to *Arizona v. Gant*, __ U.S. __, 129 S.Ct. 1710 (2009), the respondent's Fourth Amendment rights were violated when the police officers searched his vehicle without first obtaining a warrant. The court also determined that the *Leon* good-faith exception to the exclusionary rule did not apply in this case because the good-faith exception is clearly limited to warrants invalidated for lack of probable cause and does not create a broad good-faith exception for any illegal search. *King v. Commonwealth*, 302 S.W.3d 649 (Ky.2010) (quoting

United States v. Whiting, 781 F.2d 692, 698 (9th Cir. 1986)). (App. 6a).

The Kentucky Supreme Court denied the Commonwealth's motion for discretionary review on November 10, 2010. (App. 9a).

SUMMARY OF ARGUMENT

The Fayette Circuit Court acted correctly in denying the respondent's Motion to Suppress the evidence in this case. The trial court correctly relied on *New York v. Belton,* 453 U.S. 454 (1981) in denying the respondent's motion to suppress because *Belton* was the applicable law at the time of the search of the respondent's vehicle incident to arrest.

In *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710 (2009), this Court limited *Belton*, holding that under the search incident to arrest exception to the warrant requirement, police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to

the crime of arrest might be found in the vehicle

However, this Court has also held that the exclusionary rule applies in cases only where it results in appreciable deterrence. *United States v. Leon*, 468 U.S. 897, 605-06 (1984). "Evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Illinois v. Krull,* 480 U.S. 340, 348-349 (1987) (quoting *United States v. Peltier*, 422 U.S. 531 (1975)).

In this case, there is no deterrent factor because Officer Jared acted in an objectively reasonable manner in conducting a search incident to arrest, consistent with the established case law at the time of such search. Furthermore, since the aim of the exclusionary rule is to deter future police misconduct,

this Court should expand the good-faith exception to include warrantless searches, if there is no misconduct, and the officer's actions were objectively reasonable in conducting the search.

REASONS FOR GRANTING THE WRIT

On November 1, 2010, this Court granted certiorari in *Davis v. United States*, 131 S.Ct. 502 (09-11328) to resolve the split among the lower courts about whether the good-faith exception to the exclusionary rule applies to warrantless searches. This case presents the same issue as *Davis*: whether the *Leon* good-faith exception to the exclusionary rule applies when law enforcement officers conduct a warrantless search in objectively reasonable reliance on court of appeals precedent that is subsequently overturned by this Court. The respondent, like the petitioner in *Davis*, was arrested and placed in the back of the patrol car prior to the officer conducting a search of his vehicle. The Fayette Circuit Court relied on *New York v. Belton*, 453 U.S. 454 (1981) and *Commonwealth v*

Wood, 14 S.W.3d 557 (Ky.App.1999) in concluding that there was no constitutional violation in searching the respondent's vehicle incident to arrest. The Kentucky Court of Appeals reversed and remanded, concluding that the *Leon* good-faith exception to the exclusionary rule did not apply in this case because the good-faith exception is clearly limited to warrants invalidated for lack of probable cause. Because the resolution of *Davis* will govern the disposition of this case, this petition should be held pending the Court's decision in *Davis*.

I. A SPLIT EXISTS AMONG THE CIRCUITS ON WHETHER THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE EXTENDS TO WARRANTLESS SEARCHES.

(a) Extending The Good-Faith Exception to Warrantless Searches Has Been Approved by the Tenth, Eleventh and Fifth Circuits.

The Tenth, Eleventh and Fifth Circuits have extended the good-faith exception to the exclusionary rule to warrantless searches.

In *United States v. McCane*, 573 F.3d 1037 (10th Cir.2009), the Tenth Circuit applied the *Leon* good-faith exception in a similar case to the one at bar. *Id.*

The Tenth Circuit concluded that although the search was invalid under *Gant* because the defendant had already been handcuffed and seated in the police car, evidence gathered in the search was admissible under the *Leon* good-faith exception to the exclusionary rule. *Id.* The court reasoned that because the officers acted in objectively reasonable reliance upon settled case law, the good-faith exception should be applied to that case. *Id.* at 1045.

In *United States v. Davis*, 598 F.3d 1259 (11th Cir.2010), the Eleventh Circuit concluded that because the exclusionary rule is justified solely by its potential to deter police misconduct, suppressing evidence obtained from an unlawful search is inappropriate when the offending officer reasonably relied on well-settled precedent.

In *United States v. De Leon-Reyna*, 930 F.2d 396 (5th

Cir.1991), the Fifth Circuit specifically concluded that the good-faith exception to the exclusionary rule applied to warrantless searches.

(b) The First, Sixth, Seventh and Ninth Circuits have concluded that the good-faith exception to the exclusionary rule should not be extended to warrantless searches.

In *United States v. Curzi*, 867 F.2d 36 (1st Cir.1989), the court determined that the good-faith exception to the exclusionary rule did not apply to warrantless action.

The Sixth Circuit Court of Appeals refused to extend the good-faith exception to a warrantless search which the government argued fell under the "exigent

circumstances" exception to the warrant requirement. *United States v. Morgan*, 743 F.2d 1158 (6th Cir.1984).

In *United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070(7th Cir.2003), the Seventh Circuit declined to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law ... absent magistrate approval by way of a search warrant.

In *United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir.2009), the Ninth Circuit concluded that extending the good-faith exception would undermine the retroactivity doctrine set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

(c) The states are split with regard to whether the good-faith exception should be extended to warrantless searches.

The states are also split as to whether the good-faith exception to the exclusionary rule should be extended to warrantless searches.

Several states have addressed this issue and concluded that the good-faith exception should not be extended to include warrantless searches. See *Smith v. Commonwealth*, 55 Va.App.30, 683 S.E.2d 316 (2009) (no good-faith exception in warrantless frisk based upon computer database alert listing the defendant as "probably armed"); *King v. Commonwealth*, 302 S.W.3d 649 (Ky.2010) (*Leon* good-faith exception is limited to

warrants invalidated for lack of probable cause); *People v. McCarty*, 229 P.3d 1041 (Colo.2010) (the good-faith exception does not apply to searches carried out in reliance on pre-*Gant* case law); *State v. Morse*, 156 Wash.2d 1, 123 P.3d 832 (2005) (declining to create a good-faith exception in warrantless searches based upon a reasonable belief by law enforcement that they were acting in conformity with one of the exceptions to the warrant requirement).

Other states have concluded just the opposite. See *Brown v. State*, 24 So.3d 671 (Fla. 5th DCA 2009) (good -faith exception was applicable where officer was acting in good-faith reliance on widely-accepted interpretation of the law as it stood on the date of the search); *McCain v. State*, 194 Md.App. 252, 4 A.3d 53 (2010) (good-faith exception applied when a Supreme Court ruling upset clearly settled law on which the

officer had reasonably relied); *State v. Daniel*, 242 P.3d 1186 (Kan.2010) (A good-faith exception to the exclusionary rule applied when officer's warrantless search in reliance on a statute later declared unconstitutional was objective and reasonable).

II. EXTENDING THE GOOD-FAITH EXCEPTION IS CONSISTENT WITH PURPOSE OF THE EXCLUSIONARY RULE AND CONSISTENT WITH THIS COURT'S OPINIONS.

(a) The purpose of the exclusionary rule is accomplished if the good-faith exception is extended to warrantless searches.

In *Herring v. United States*, ___ U.S. __, 129 S.Ct. 695, 702, 172 L.Ed.2d 496 (2009), this Court stated the

following:

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence."

However, where the officer's conduct is objectively reasonable, as Justice White eloquently stated:

"... excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."

Stone v. Powell, 428 U.S. 465, 539-540 (1976).

The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. *Herring*, supra at 701. If the purpose of the exclusionary rule is

to deter police misconduct, extending the good-faith exception to warrantless searches where there is no misconduct would be consistent with such purpose.

(b) This Court's opinions support extending the good-faith exception to warrantless searches.

This Court has expanded the good-faith exception to the exclusionary rule in order to accommodate objectively reasonable police reliance on: subsequently invalidated search warrants, *United States v. Leon,* 468 U.S. 897 (1984); subsequently invalidated statutes, *Illinois v. Krull,* 480 U.S. 340 (1987); inaccurate court records, *Arizona v. Evans,* 514 U.S. 1, (1995); and negligently maintained police records, *Herring,* ---U.S. ----, 129 S.Ct. 695 (2009). In each of its decisions

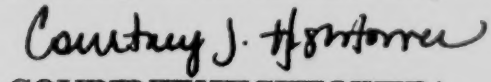
expanding the exception, this Court has concluded that the unlawful police conduct at issue was neither "sufficiently deliberate that exclusion [could] meaningfully deter it" nor "sufficiently culpable that such deterrence [would be] worth the price paid by the justice system." *Herring,* 129 S.Ct. at 702.

Extending the good-faith exception to warrantless searches is consistent with these opinions. Just as this Court determined in *Leon*, *Krull*, *Evans* and *Herring*, if the officer's conduct is objectively reasonable in conducting the warrantless search, suppressing the evidence would not further the purpose of the exclusionary rule.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* should be granted.

JACK CONWAY
Attorney General of Kentucky



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APPENDIX

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals
NO. 2009-CA-000147-MR

REYES VALESQUEZ APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CR-01241

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF[1], SENIOR JUDGE.

LAMBERT, JUDGE: Reyes Valesquez appeals from a conditional guilty plea entered by the Fayette Circuit Court on December 5, 2008. Valesquez entered a plea of guilty to first-degree trafficking in a controlled substance, possession of drug paraphernalia, and operating on a suspended or revoked license. This plea was conditioned on the preservation for appeal

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[1]Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS 21.580.

of Valesquez's motion to suppress the contraband discovered in Valesquez's vehicle. Valesquez argues that the holding set forth in *Arizona v. Gant,* __ U.S. __, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), is controlling in this matter and compels a reversal of the trial court's denial of Valesquez's motion to suppress. Agreeing that the trial court's ruling is erroneous under the new authority developed in *Gant*, we hereby vacate the final judgment and sentence entered against Valesquez on January 22, 2009, as well as the November 18, 2008, order denying Valesquez's motion to suppress. This matter shall be remanded to allow Valesquez to withdraw his guilty plea pursuantto Kentucky Rules of Criminal Procedure (RCr) 8.09 and for further proceedings consistent with this opinion.

On August 17, 2008, Officer Brian Jared conducted a traffic stop of Valesquez's vehicle for failing to use his blinker when he turned left in a left-turn only lane.[2] Upon checking Valesquez's license, it was discovered that Valesquez was driving on a suspended license. Officer Jared placed Valesquez under arrest for this offense.

About the time that Valesquez was being removed from his vehicle, two additional police officers arrived at the scene. While Officer Jared placed Valesquez into the cruiser, the two other

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[2]When asked why he stopped Valesquez for such a trivial traffic violation, Officer Jared responded that this is often done to investigate whether people are driving under the influence, have outstanding warrants, or are operating their vehicles with a suspended license.

officers began a search of Valesquez's. The parties agree that Valesquez was secured in the back of Officer Jared's vehicle during the vehicle search.

The search revealed three bags of cocaine and a set of digital scales found underneath the backseat. Officer Jared testified that no incriminating evidence was in plain view. Rather, during the search, the backseat was discovered to be "loose and ajar" when one of the officers leaned on the seat to look under it. Leaning on the seat caused it to move. The officers then touched the seat and it easily lifted. Upon having his *Miranda* rights read to him at the scene, Valesquez agreed to talk to the officers and eventually admitted that he was about to engage in a drug deal.

During the criminal proceedings that inevitably followed, Valesquez moved to suppress the fruits of the vehicle search on grounds that such a warrantless search was in violation of both the U.S. and Kentucky Constitutions. Relying on *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and *Commonwealth v. Wood*, 14 S.W.3d 557 (Ky. App. 1999), the trial court concluded that police have long been permitted to search the entire passenger compartment of a vehicle that was occupied or recently occupied by an arrested person under the "search-incident-to-arrest" exception to the warrant requirement. *See also Thornton v. United States*, 541 U.S. 615, 617, 124 S.Ct. 2127, 2129, 158L.Ed.2d 905 (2004) (*Belton* also applies to vehicles of recent occupants).Valesquez thereafter entered a conditional guilty plea and appealed to this Court.

During the pendency of this appeal, the U.S. Supreme Court rendered *Gant*, which altered the long-standing rule set forth above. Acknowledging that the Court's holding in *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search[,]" the *Gant* Court held that this reading of *Belton* shall now be rejected. 129 S.Ct. at 1718. Instead, the Court directed that the new reading of *Belton* shall allow police to "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 129 S.Ct. at 1719. The *Gant* Court further held that searches of an arrestee's vehicle may also be conducted without a warrant when "it is reasonable to believe [that] evidence relevant to the crime of arrest might be found in thevehicle." *Id.* (internal citation and quotation omitted). In light of these new standards, reevaluation of Valesquez's motion to suppress is necessary. *SeeGriffith v. Kentucky*, 479 U.S. 314, 322, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987)("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

The Commonwealth does not challenge Valesquez's contention that his Fourth Amendment rights were violated under the new constitutional precedent set forth in *Gant*, nor does the Commonwealth offer any alternative grounds for justifying the warrantless search. Officer Jared

testified at the suppression hearing that his only reason for stopping Valesquez was the commission of a minor traffic offense. He further stated that during the arrest there was nothing in plain view which generated a suspicion that Valesquez may have drugs or drug paraphernalia in the vehicle. As the pertinent facts are not in dispute, there are no grounds for remanding this case for further factual findings by the trial court.

Rather, only questions of law remain for this Court's determination. *See Commonwealth v. Pride*, ___ S.W.3d ___, 2010 WL 245591 (Ky. 2010) (warrantless searches are reviewed *de novo*). Upon careful review, we agree with Valesquez that his Fourth Amendment rights were violated as a matter of law when the police officers searched his vehicle without first obtaining a warrant to do so. *See United States v. Lopez*, 567 F.3d 755, 757-58 (6th Cir. 2009) (warrantless search of passenger compartment of vehicle unconstitutional where driver was arrested for reckless driving); *Gant*, 129 S.Ct. at 1714 (warrantless search of passenger compartment of vehicle unconstitutional where driver was arrested for driving on a suspended license). As set forth in *Gant*, the arrest itself, without more, was not sufficient to justify the warrantless search in this case.

The Commonwealth argues on appeal that the equities of these circumstances justify the application of the "good faith" exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to this case. In other words, even though

Valesquez's constitutional rights were violated, he should not be afforded the remedy of having the fruits of this illegal search and seizure suppressed because it is undisputed that the officers in this case operated in "good faith" and under law that was well-settled at the time of the search.

Whether the "good faith" exception to the exclusionary rule may be utilized, as a matter of law, to preserve the admissibility of evidence discovered from searches conducted pursuant to settled law at the time of the search is an open question. Compare *United States v. McCane*, 573 F.3d 1037, 1044-45 (10th Cir.2009) ("good faith" exception to exclusionary rule applies in these cases) with *United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir. 2009) ("good faith" exception to exclusionary rule not applicable in light of clear precedent set forth in *Griffith* and *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)); see also *United States v. Lopez*, 2009 WL 3112127 (E.D. Ky. Sept. 23, 2009) (applying the good faith exception); *United States v. Peoples*, 2009 WL 3586564 (W.D. Mich. Oct. 29, 2009) (stating that "good faith reliance upon case law cannot excuse suppression under the current formulation and application of the good-faith doctrine."); *United States v. Buford*, 623 F.Supp.2d 923, 927 (M.D.Tenn. 2009) (involving the retroactive application of *Gant* in the context of a motion to suppress and stating that the extension of the good-faith exception would cause "perverse results" in that case).

The Sixth Circuit has yet to articulate a definitive ruling on this question other than to hold

that reliance on pre-*Gant* case law to allow a *Belton* search was not plain error in a case in which the defendant failed to preserve the question for appellate review. See *United States v. Deitz*, 577 F.3d 672, 687-88(6th Cir. 2009).

The law is currently emerging and unsettled. This important constitutional question is destined to be determined at the highest levels of not only this court system, but the federal court system as well. Until then, we elect to follow the dicta set forth by the Kentucky Supreme Court in *King v. Commonwealth*, ___ S.W.3d ___ , 2010 WL 246060 (Ky. 2010), declaring that"the *Leon* good faith exception is 'clearly limited to warrants invalidated for lack of probable cause' and does not create a broad good faith exception for any illegal search." *Id.* at 7 (quoting *United States v. Whiting*, 781 F.2d 692, 698 (9th Cir.1986)). A contrary interpretation, we believe, is not reconcilable with the binding authority set forth in *Griffith v. Kentucky*, *supra*, 479 U.S. at 326, 107 S.Ct. at 715(overruling prior case law that excepted the retroactive application of new constitutional rules that were deemed to have represented a "clear break" from past precedent).

Accordingly, we hereby vacate the final judgment and sentence entered against Valesquez on January 22, 2009, as well as the November 18, 2008, order denying Valesquez's motion to suppress. This matter shall be remanded to allow Valesquez to withdraw his guilty plea pursuant to RCr 8.09 and for further proceedings consistent with this opinion.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY
2010-SC-0193-D
(2009-CA-0147)

COMMONWEALTH OF KENTUCKY MOVANT

V. FAYETTE CIRCUIT COURT
2008-CR-1241

REYES VELASQUEZ RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED: November 10, 2010

/S/ JOHN MINTON
CHIEF JUSTICE

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FOURTH DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER NO.08-CR-1241

REYES VELASQUEZ DEFENDANT

****

This matter came before the Court on the 13th day of November, 2008 on a Motion to Suppress filed by the attorney for the Defendant. The Court having heard testimony and statement for the Defendant and statements for the Commonwealth and being otherwise sufficiently advised;

It is hereby ORDERED that the Motion to Suppress is OVERRULED and this case is set for a Status Hearing on December 5, 2008 at 1:00 p.m.

It is further ORDERED that the Defendant's Oral Motion to Reduce Bond is hereby OVERRULED.

Dated this 18th day of November, 2008

/S/ Pamela R. Goodwine
JUDGE, FAYETTE CIRCUIT COURT